IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE

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The National League of Cities and the United States Conference of Mayors move the Court under Rule 35 for leave to file the attached brief *amici curiae* in the above-entitled case, and in support thereof state:

1. The National League of Cities is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all,

almost 15,000 cities and municipalities, both the largest and the smallest, are members of and participate in the activities of the National League. There are no more essential and ubiquitous participants in the Nation's waste water treatment efforts than the cities, towns, villages and boroughs which must design, construct, maintain, operate and pay for a major portion of the water and sewerage facilities of the Nation.

The United States Conference of Mayors is an organization of city governments represented through their chief elected officials, Mayors. It was organized in 1933 to promote the causes of the city, to foster responsible and effective relationships between city halls and the federal government, and to assist local governments in their responsiveness to the needs of their citizens. Municipalities, approximately 800 of which are represented by the United States Conference of Mayors, and their associated governmental entities, have major responsibilities for liquid waste treatment throughout the Nation.

2. The members of these organizations have taken steps, including planning, constructing and financing waste treatment facilities to meet the limitations on discharge of liquid wastes established by Congress in the Federal Water Pollution Control Act of 1972, as amended, 33 U.S.C. §§ 1251-1376, and by the implementing regulations issued by the Environmental Protection Agency, 40 C.F.R. Part 133.

3. The decision of the Seventh Circuit Court of Appeals, in upholding relief to plaintiff States based on principles of federal common law, grants far different and more stringent relief against the municipal defendants than that established by Congress and the Environmental Protection Agency.

4. The decision below has far-reaching consequences for municipalities, many of whom could be vulnerable to suit if it should be established that states are able to seek relief under federal common law for discharges of effluents into navigable waters at levels that are permitted and deemed acceptable under the comprehensive scheme for water pollution control enacted by Congress. The significance of this case goes far beyond the interests of the parties, with important implications for the entire national effort to abate and control water pollution from municipal sources. For this reason, it is important that the Court, as it evaluates the specific contentions of the parties, understands fully the impact the case could have on the capacities of our cities to build and operate the water treatment facilities which the federal law and regulations mandate.

5. This case presents important issues of law of direct concern to the members of the *amici curiae* organizations:

a. Does the federal common law of nuisance survive with respect to public discharges of effluents otherwise permitted under the federal statutory scheme?

b. If so, what are the appropriate parameters to guide the lower courts in determining that public nuisances exist and in fashioning remedies to be applied against public waste treatment agencies to remedy the nuisances?

While these issues will be addressed by the parties, the national perspective which the *amici* organizations can bring is broader than the interests of the parties.

6. Accordingly, the *amici curiae* seek this opportunity to make known their views to the Court and to attempt to assist the Court in determining the issues presented by this case.

7. Consent has been sought from the parties for the filing of a brief *amicus curiae* by the aforementioned organizations. Consent was refused by counsel for the State of Michigan.

Respectfully submitted,

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BRIEF OF NATIONAL LEAGUE OF CITIES AND UNITED STATES CONFERENCE OF MAYORS AS AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The interests of the National League of Cities and the United States Conference of Mayors are set out in the foregoing Motion.

SUMMARY OF ARGUMENT

The *amici curiae* argue—both as a matter of law and in the interests of timely and efficient achievement

of our nationally mandated water pollution control policies—that the judicially ascertained federal pollution control standards articulated by the federal courts as the federal common law of nuisance, in the circumstances of the case at bar, are required to coincide with and thereby be consistent with the federal statutory pollution control standards.

In contrast, the courts below have fashioned common law standards which deviate substantially from and otherwise conflict (in terms of practicality and cost effectiveness, for example) with federal statutory standards and the regulations issued by the federal executive agencies.

The *amici* wish to alert this Court to the fact that promulgation by the federal courts, on the one hand, and by Congress and the federal agencies on the other, of contrasting common law and statutory pollution control standards have generated uncertainty, confusion and consequential delays in the planning, financing and construction of municipal water treatment facilities in many communities across the Nation. These uncertainties and delays, in turn, seriously jeopardize the prospects of achieving the goals and timetables mandated by Congress in the Federal Water Pollution Control Act.

Accordingly, for practical as well as legal reasons, the *amici* urge that there be one federal antipollution standard that can be relied upon by the municipalities for uniformity and finality in matters of water pollution standards. This standard should be that contemplated by the Federal Water Pollution Control Act.

ARGUMENT

A. Achievement Of National Water Quality Policies Depends Upon Clear National Standards To Guide The Actions Of Municipal Governments

The restoration and protection of the Nation's water resources and the achievement of the other goals which Congress has set out in the Federal Water Pollution Control Act, 33 U.S.C. §§ 1251-1376[1] are dependent in large measure upon the present and future ability of the Nation's many municipal governments to work with the federal government and to deal effectively and efficiently with water pollution in the context of the applicable federal regulations.

From the beginning, Congress has looked to the States to lead the Nation's efforts to abate water pollution.[2] Consequently, Congress has been aware of the link between progress toward national clean water goals and the methods and performance of sub-state governments. In developing the federal water programs, Congress has paid particular attention to the characteristics and needs of local governments, to the advice of

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[1] Hereafter the Federal Water Pollution Control Act, as amended, is referred to as "FWPCA" and "the Act".

[2] See, for example, the Senate Public Works Committee Report issued in conjunction with the 1972 amendments to the FWPCA:

> "For more than two decades, Federal legislation in the field of water pollution control has been keyed primarily to an important principle of public policy: The States shall lead the national effort to prevent, control and abate water pollution. As a corollary, the Federal role has been limited to support of, and assistance to, the States." S. REP. NO. 414, 92d Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3669.

municipal leaders, and to the testimony offered by National League of Cities and United States Conference of Mayors.[3]

This critical role of sub-state governmental entities also explains why the *amici curiae* have a substantial and continuing interest in the questions presented here for review.

The *amici* and many of their members have participated actively in the development of the comprehensive body of federal legislation and regulation related to water pollution control. Representatives of the *amici* have testified before congressional committees during consideration of both the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 and the Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1566 (codified at 33 U.S.C. §§ 1251-1376 (1978)). The *amici* have also participated actively in many of the rulemaking proceedings pursuant to these Acts, 40 C.F.R. Parts 100-149.

More importantly, members of the *amici* organizations shoulder the major responsibility for implementing the ambitious program of water pollution control being

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[3] "The oversight portion of the 1971 hearings was conducted by the Subcommittee on Air and Water Pollution on February 4, 8, and 9. Among the witnesses were the Administrator of the Environmental Protection Agency and members of his staff; the Mayors of Detroit, Michigan, and Atlanta, Georgia, and representatives of the National League of Cities and the United States Conference of Mayors." *Id.* at 3671.

Also,

> "Estimates received by the Commission from the National League of Cities—United States Conference of Mayors during its hearings last year place the total national need for the next five years at more than $30 billion. The figure covers only needs already identified by local officials." *Id.* at 3673.

undertaken across the Nation in response to the federal legislation. Cities, towns, municipal sewerage agencies and specially created sanitary districts are involved in all aspects of the planning, design, financing, construction, and operation of waste water treatment facilities.

The success of these efforts, measured against the aims of the Federal Water Pollution Control Act, is dependent upon a variety of prerequisites. But there is no element, including money, which is more critical to the effectiveness of the Nation's long-term antipollution activities than reliable and clear performance standards from which the municipalities (and everyone else) can derive explicit direction as to what, in a given instance, constitutes a legal and publicly accountable response to the requirements of the national antipollution laws. To mount effective antipollution programs, city officials need to know what are the rules and what they must do to abide by them, presently and for the future.

In this context, the decisions of the courts below have enormous and far-reaching implications for municipalities. Literally thousands of towns have made political, engineering and financial decisions with respect to waste treatment in reliance on the comprehensive body of federal statutory and regulatory law which emanates from the 1972 and 1977 Acts and which now governs the waste water treatment field. If the decision of the court below is permitted to stand, the course taken by local agencies will be cast in doubt. If actions to enjoin water pollution based on the federal common law of nuisance will lie against public agencies holding valid discharge permits issued under the federal statutory scheme, these agencies will face the prospect of entirely different treatment standards being set according to the vagaries of litigation. Countless suits will be

encouraged, and the standards developed by courts will not be known until long after key decisions have been made and funds committed for those treatment modes now required by federal statute and regulations.

The ability of local agencies to rely on the substantial statutory and regulatory scheme envisioned in the 1972 and 1977 Acts is critical in light of the mutual interdependence of all major governmental systems and of the complex investment, planning and utilization decisions which must be made with regard to those systems. For example, waste water control planning is an integral and elementary part of any land use, public transportation, public facilities, and debt financing plan that local agencies attempt to undertake. The loss of that certainty which would result from an affirmance in the case at bar could contribute to a considerable loss of continuity and cohesion in local planning, development, and financing efforts, many of which are directly related to attempts to fulfill other federal policies.

If federal courts may prescribe treatment standards far more stringent than Congress has required—total elimination of combined sewer overflows, for example—municipalities will be faced with financial obligations far in excess of current capacity and expectations, and for which federal financial assistance will not be forthcoming.

If courts may order abatement above and beyond that required by statute on the basis of the relatively relaxed standard of proof applied below, and if courts may fashion remedies without regard to considerations of cost and efficiency, similarly situated communities across the country can be expected to face radically different waste treatment obligations.

For the municipalities the issues before this Court transcend the controversy between Illinois and Milwaukee. What is needed from this Court are clear and reasonable principles to reconcile the requirements of federal common law and the national statutory standards.

The *amici* urge that the federal common law of nuisance applied by the courts below conflicts with the burden of the federal regulations which stress practicability and cost effectiveness as important attributes.[4] They also argue that the common law standards articulated below are too amorphous to guide an antipollution program which is national in scope and, therefore, dependent upon explicit national standards for effectiveness. Consequently, for the reasons elaborated upon below, it is the expectation of the *amici* that the common law of nuisance, if that law is as the courts below have defined it, will operate to confuse municipal officials and thereby to militate against and delay the achievement of federally mandated clean water objectives. Moreover, it would be ironic if the achievement of the congressionally mandated clear water standards were to be frustrated by an inconsistent, albeit well-intentioned, attempt by the courts to fashion common law remedies which contemplate standards above and beyond those defined by Congress.

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[4] The FWPCA repeatedly stresses the importance of practicality and cost effectiveness. For example, all point sources must adopt the "best practicable control technology currently available" 33 U.S.C. § 1311(b)(1)(A), and the "best available technology economically achievable" 33 U.S.C. § 1311(b)(2)(A); publicly owned treatment works are required to adopt "the best practicable waste treatment over the life of the [treatment] works" 33 U.S.C. §§ 1311(b)(2)(B), 1281(g)(2)(A).

B. The Federal Common Law Of Nuisance Articulated In The Case At Bar Confuses And Conflicts With National Regulatory Policy And Standards

When in 1972 and 1977 Congress amended the FWPCA, it provided a basis for a comprehensive national regulatory scheme for the control of water pollution. The arrangement contemplated a realistic and practical approach to the problems of water pollution under regulations characterized by a substantial degree of uniformity, finality and enforceability. The federal standards adopted for the national antipollution program were intended to be consistent, final and reliable in the sense that they offered to municipal governments a firm basis for planning for the future.[5]

In contrast, the case at bar has been governed below, not by the federal statutory plan, but by something called the federal common law which, at least

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[5] The legislative history of the 1972 Amendments makes this clear. For example:

> "Except as provided in section 301(c) of this Act, [economic based variance for industrial point source from 1983 standard] the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." S. REP. NO. 1236, 92d Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3776, 3803.

The Courts have acknowledged this Congressional mandate for uniformity. *National Resources Defense Council, Inc.*, v. *Train*, 510 F.2d 692, 711 (D.C. Cir. 1975); *Natural Resources Defense Council, Inc.*, v. *Costle*, _____F.2d_____, _____, 10 ERC 2025, 2031 (D.C. Cir. 1977).

in the instance of nuisance, represents a flexible and pragmatic approach to the particular circumstances and wholly dependent upon the particular views of the court before which the case pends. The method is described by Justice Douglas in *Illinois* v. *Milwaukee,* 406 U.S. 91, 107 (1972):

> [F]ederal courts will be empowered to appraise the equities of the suits alleging creation of a public nuisance by water pollution. . . . There are no fixed rules that govern; these will be equity suits in which the informed judgment of the chancellor will largely govern. (footnotes and citations omitted)

This rule articulated by the Court of Appeals and applied in this case came down to one deceptively cryptic sentence: "The elements of a claim based on the federal common law of nuisance are simply that the defendant is carrying on an activity that is causing an injury or significant threat of injury to some cognizable interest of the complainant." *Illinois* v. *Milwaukee,* 599 F.2d 151,165 (7th Cir. 1979). It would be difficult to disagree with this description of the common law; but given among other considerations the theoretical and tenuous nature of the proof offered and accepted by the lower courts, it would be more than difficult to extrapolate from the case at bar how this federal rule might work out in the future in other circumstances. What degree of cleanness of water comprises a complainant's cognizable interest and how dirty must be a discharge to constitute injury? These standards are at least elusive.

Consider the dilemma of a municipal officer, charged with the responsibility for planning, designing, financing, constructing and operating waste water treatment facilities, who has reviewed the federal law of nuisance as illustrated in the case at bar and now is at-

tempting to anticipate his future water treatment requirements under federal statutory and common law. It appears to him that under the federal common law of nuisance, the federal courts can reject as not controlling the experience and judgments of federal antipollution administrators and the regulations, procedures and standards of the federal statutory water pollution programs (the municipal officer's bible). And in lieu thereof it seems that the courts can and do devise their own pollution control standards under which almost any degree of pollution in the exclusive judgment of the court can be regarded as an enjoinable threat of injury to a complainant. Equally disturbing to the municipal official, when the court finds any threat of injury, it then can design, engineer and decree as a remedy any kind of treatment facility and any degree of control or treatment, within or beyond federal pollution control standards, which the court finds to be appropriate without regard for costs or cost effectiveness and unrelated to the degree of injury suffered by the complainant.

Placed in its most invidious light, the case at bar suggests to the city water treatment official that under precepts of federal common law, each federal court can invent its own federal pollution control program with no more regard for the Federal Water Pollution Control Act than the court in its judgment chooses to grant. And if the municipal official asks—what are the federal court's antipollution laws, his lawyers will tell him—there are no fixed rules that govern; the informed judgment of the court will govern. And what, he asks, if our city has fully complied with all the federal statutes and regulations? That will satisfy the Executive Branch, the lawyers will answer. But the antipollution laws of the Judicial Branch are different.

On behalf of the municipal participants in the Nation's water pollution control programs, the *amici* urge

that in the interests of more efficient, and therefore, more effective public pollution control policy the local government participants should be offered standards of performance which can be understood and which offer the virtues of reliability, uniformity and finality. The federal common law of nuisance as applied in the case at bar is not such a standard.

C. The Federal Common Law Of Nuisance Must Be Consistent With Federal Statutory Pollution Control Laws

We leave to others the argument of whether the federal water pollution control statutes have pre-empted the federal common law of nuisance—although we believe they have. *Committee for Jones Fall Sewerage System* v. *Train,* 539 F.2d 1006 (4th Cir. 1976); *Arizona* v. *California,* 373 U.S. 546 (1963). And we submit no brief on the question of whether Section 505(e) of the FWPCA, 33 U.S.C. § 1365(e) (1978) (which preserves certain statutory and common law rights and remedies involving enforcement of effluent standards) was either intended by Congress or operates to distinguish the federal common law of nuisance from the federal statutory antipollution laws and to preserve the former as a separate and distinct body of law—although we believe as a matter of congressional intent[6] and a matter of law it does neither.[7]

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[6] The legislative history of Section 505(e) is silent with respect to its intentions to preserve a separate federal common law, but the Senate Report which explains its intentions with respect to *Section 505—Citizen Suits,* notes that "Section 505 would not substitute a 'common law' or court-developed definition of water quality." S. REP. NO. 414, 92d Cong., 2d Sess. reprinted in [1972] U.S. CODE CONG. & AD. NEWS 3668, 3745.

[7] "While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not

In essence, it is the argument of the *amici* here that given the essential character and purpose of the federal common law generally, and the scope and nature of the federal antipollution laws and regulations, the two sets of laws must be and should be reconciled and harmonized. And, for the reasons suggested earlier, we urge this result in the interests of a more effective national water pollution control policy.

The confusions created by the case at bar are engendered in part by the inconsistencies between the comprehensive FWPCA statutory standards and the standards which the court adopted to determine the rights of the parties and the remedies to be applied in the case at bar. Thus, in the view of the *amici* the controlling question is not whether the FWPCA has superseded the common law or whether Congress intended to preserve two separate and distinct federal rules, the statutory rule and the common law rule—but rather the controlling question is whether under the federal common law the "chancellor" is authorized to exercise his informed judgment exclusively and without reference to and accommodation of the federal statutory law and regulations. We think not. And we argue here that the "chancellor" must look to the FWPCA and its federal statutory standards to determine if the elements of a federal common law nuisance exist and, if they do exist, what is to be the appropriate remedy.

Typically, federal courts have developed judicially ascertained federal policy when this expedient is necessary to provide a national unity of rules in response to overriding federal interests. For example,

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turn to a supposed body of federal common law to impose stricter standards than the statute provides." *Committee for Jones Falls Sewerage System, supra,* at 1009 (footnote omitted).

the federal courts have found it appropriate to develop and apply a federal common law where federal interests in foreign affairs demanded such treatment, *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), and where other similar essential interests of the federal government are concerned, *United States* v. *93.970 Acres of Land,* 360 U.S. 328 (1959). Likewise, a federal common law has been evolved for activities which by their nature must be uniform throughout the Nation, *United States* v. *Yazell,* 382 U.S. 341 (1966), or where it is necessary to devise federal remedies for violations of federal rights, *J. I. Case Co.* v. *Borak,* 377 U.S. 426 (1964).

Accordingly, *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) is cited as authority for the propositions, among others, that the federal common law is applied when a controversy touches the basic interests of federalism and where it is necessary to respond to an overriding federal interest and where the need for uniformity is paramount and when there is a need to develop federal remedies for transgressions of federal rights. Ludington, *The Supreme Court and the Post-Erie Federal Common Law,* 31 L.Ed.2d 1006, § 3 at 1014 n. 18, § 3 at 1016 n. 19, § 3 at 1016 nn. 3 & 7 (1973).

Of course, the legal setting of *Illinois* v. *Milwaukee* as it existed in 1972 has changed. With the enactment of the FWPCA and its comprehensive coverage of *all* point source discharges there is no longer a need for the courts to develop federal remedies. Congress has done so. Now the *federal* common law in essence emanates from the statute and exists only to fill interstices in the statute, if any.

In the view of the *amici,* all the criteria cited above as justification for a judicially ascertained federal policy

(e.g. a federal common law) are met by reference to the FWPCA and associated regulations. And so, if this Court finds, as did the courts below, that it was the intent of Congress not to curtail federal common law remedies, nevertheless a federal court reviewing the elements of a claim based upon the federal common law of nuisance must resort to the relevant statutory law in ascertaining if the activities of the defendant are causing injury to an interest of a complainant. The standard to ascertain the existence of these conditions must be found in the federal antipollution statutory scheme, rather than in the exclusive judgment of the Court.

While the Court of Appeals found that in the FWPCA the legislature offered no controlling rules or principles for this case, the court also noted that it could turn to that Act for indications of the legislative judgment on relevant issues of policy and principle. The court concluded that while relevant policies and principles were lacking, nevertheless in applying the federal common law of nuisance, "the minimum treatment standards found acceptable by Congress and the effluent limitations imposed under the system established in the Act provided an appropriate starting point." *Illinois* v. *Milwaukee,* 599 F.2d 151, 164 (7th Cir. 1979).

In *Wallis* v. *Pan American Petroleum,* 384 U.S. 63, 69 (1966), (cited by the Court of Appeals in conjunction with the foregoing) the court wrote "If there is a federal statute dealing with the general subject, it is a prime repository of federal policy and a starting point for federal common law." The starting point in the case at bar, of course, is the FWPCA prior to the 1972 amendments. But the Act has been amended twice since then and as Ludington put it: "Since the federal common law is keyed to congressional policy, it may be expected to

change with congressional policy and to grow with the increase in federal statutory law." Ludington, *supra,* § 3 at 1017 n. 17.

With these considerations in mind, we now turn our attention to the particular elements of the federal common law of nuisance manifest in the case at bar. The *amici* argued earlier that an effective national antipollution program requires the utilization of standards which are comprehensible and provide the necessary uniformity and finality to make planning into the future feasible. The Court of Appeals, in its opinion, found that in the FWPCA Congress "has established a comprehensive and detailed system for the regulation and eventual elimination of pollution discharges into the Nation's waters." *Illinois* v. *Milwaukee,* 599 F.2d 151, 162 (7th Cir. 1979). But the Court also found that the Act contemplated certain variations in standards and concluded that under the Act "it is plain that uniformity was not thought necessary." *Id.* at 162.

The *amici* urge here that while the Act may contemplate variances in standards, there is not the slightest evidence that the law contemplated two distinct and different *federal* standards—one mandated by Congress and the Environmental Protection Agency and the other invented and decreed by the courts and applied when and where the courts deem fit. But beyond this fact, the *amici* urge on this Court that the essential nature of the federal common law coupled with the comprehensiveness of the FWPCA preclude the courts from adopting common law pollution standards which are inconsistent with the statutory standards. In fact, by applying the statutory standards all the necessities which are used to explain and justify resort to judicially ascertained federal common law—the need for uniformity, the

linkage with the federal statutory scheme, the overriding federal interest and the rest are all appropriately served. And conversely, the fashioning of a federal common law rule which differs from the federal statutory rule does not meet the need for uniformity and a national rule, which need typically is the justification for the federal courts' resorting to judically ascertained federal policy—the federal common law.

Accordingly, the *amici* urge that the Court, in considering the elements of the federal common law of nuisance, and viewing activities involving the discharge of waste waters which generally meet the standards decreed by federal antipollution regulations, and particularly those discharges of waters which are authorized by and conform with a permit issued in accordance with federal laws and regulations, that such discharges not be held such an injury as will support an action for nuisance.

The *amici* also urge that given conditions and circumstances which have been found by the federal courts to constitute a nuisance, the remedies mandated by the Court must conform to the federal policies and standards expressed by Congress in and through the FWPCA. The *amici* urge that the standards imposed by the courts be no more stringent than those adopted under the federal statutes.

If this Court should find, as did the Court of Appeals, that the rules and principles expressed by Congress in and through the FWPCA will admit variations in antipollution standards, and if the Court should conclude that Congress contemplated the perpetuation of a federal common law of nuisance with a potential for variations between judicial standards and the prevailing statutory standards, nevertheless in the absence of any

overriding need for separate judicial standards, a single standard should prevail for both bodies of federal law.

To apply one standard to the case at bar would be consistent with the rationale for developing federal common law standards and would be consistent as well with the desires and intent of Congress to mount an efficient, effective and rational antipollution program which would work to foster and preserve the country's water resources.

CONCLUSION

From the viewpoint of the *amici,* the importance of the case at bar lies in its potential for delaying significantly the achievement of national clean water objectives.

The apprehensions of the *amici* are grounded in reality as the case at bar unequivocally demonstrates. The legal controversy known as *Illinois* v. *Milwaukee* has been working its way through the courts of the Nation for the better part of a decade. This time- (and money-) consuming process cannot be ascribed to the proposition that Milwaukee persists in asserting its right to pollute Lake Michigan. Rather it is clear testimony that the federal common law of nuisance as interpreted and applied by the courts below is a bad rule and that bad rules delay the achievement of national water objectives. Certainly this is what the *amici* assert.

Reduced to essentials, the water and sewage problems of Milwaukee (and Illinois) are very much like those which are confronting literally thousands of municipal communities throughout America. The differences have to do with time, size and degree. Success in dealing responsibly and effectively with these needs

and these water resource difficulties is dependent, among others, upon such basic considerations as the quality of the planning applied to these issues (including realistic appraisals of future needs), the development of practical technologies to cope with pollution, stable and reasonable laws and regulations, competence and wisdom on the part of administrators charged with the responsibility for dealing with water pollution, and the efficient use of available resources.

When viewed against these requirements, the implications of the decisions in the case at bar, carrying with them as they do a potential for disruption and confusion, are reasonable grounds for concern among municipal officials and for this Court as well. If, as it appears, the lower court's actions create uncertainty by mandating arbitrary and even quixotic standards for pollution control and mandating excessive capacities and expenditures as well, then there is a very real possibility that these court decisions will continue to be a serious impediment to national water pollution control objectives.

To lessen the risks of casual variations in pollution standards and to assure prudent use of available antipollution resources, the Nation must adopt uniform, final and reliable effluent standards. Government regulations must be characterized by uniformity, finality and enforceability. In the absence of these necessary and reasonable characteristics, the Nation's antipollution programs are likely to encounter official procrastination nurtured by uncertainty, or perhaps unnecessary waste of scarce resources, or worse, substantial deterioration of water resources.

The Court should be aware of and alert to these very real possibilities. This case affords an opportunity to

declare the supremacy of statutory standards and thereby to respond to the pressing need for reasonable certainty and reliability in these matters.

Respectfully submitted,

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